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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH JOSEPH WALKER

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

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QUESTION PRESENTED

Whether a law enforcement officer may briefly question a lawfully detained motorist concerning the presence of alcohol, drugs, weapons, or large quantities of cash in the motorist's vehicle as part of the detention justified by the initial stop.

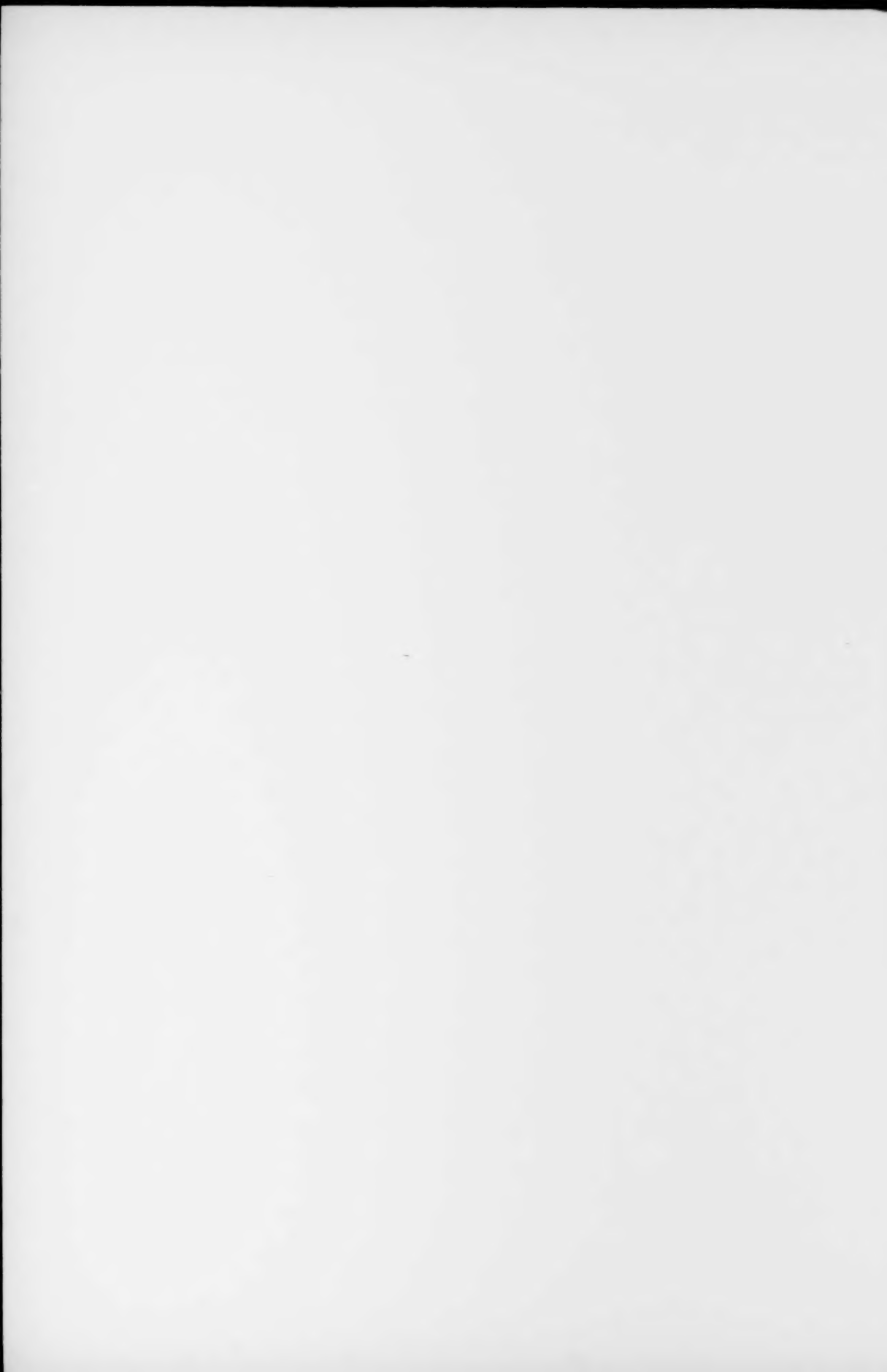


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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, 1a-12a, is reported at 933 F.2d 812. The opinion of the court of appeals on denial of rehearing, App., *infra*, 15a-24a, is reported at 941 F.2d 1086. The opinion of the district court, App., *infra*, 25a-36a, is reported at 751 F. Supp. 199.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1991. A petition for rehearing was denied on August 13, 1991. On November 4, 1991, Justice White extended the time for filing a petition for a

writ of certiorari to and including December 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. On January 10, 1990, respondent was traveling in Utah on Interstate 70 at a rate of 67 miles per hour, 12 miles per hour in excess of the posted speed limit. After measuring respondent's speed by radar, Officer Graham of the Emery County Sheriff's Department pulled him over to issue a traffic citation. Before approaching respondent's vehicle, Officer Graham ran a National Crime Information Center (NCIC) computer check of the vehicle's license number and determined that the car had not been reported stolen. Officer Graham then approached respondent, informed him that he had been speeding, and asked respondent for his driver's license and registration. Officer Graham also asked respondent the point of origin and the destination of his trip. App., *infra*, 2a.

Respondent requested permission to get out of his car, and then handed Officer Graham the vehicle registration. Respondent's hands were visibly shaking as

he attempted to remove his driver's license from his wallet. The car was registered to one Marian Smith, not to respondent. Respondent explained that Smith was his sister, and that she had authorized him to use the car. App., *infra*, 2a-3a.

Officer Graham asked respondent if the vehicle contained any weapons, open containers of alcohol, controlled substances or paraphernalia for their use, or large quantities of cash. Respondent answered "no" to every question, except that he informed Officer Graham that he had \$1600 in cash in the glove compartment and \$150 in cash on his person. Officer Graham then requested, and received, respondent's permission to search the car. App., *infra*, 3a.

After conducting a protective pat-down search of respondent's clothing, Officer Graham searched the passenger compartment of the car and found the cash that respondent had admitted possessing. Officer Graham then requested and obtained the key to the trunk, where he found two packages wrapped in plastic tape that appeared to be kilogram packages of cocaine. Officer Graham arrested respondent and later obtained a search warrant for the vehicle. The subsequent warrant-authorized search disclosed 86 additional kilogram packages of cocaine. App., *infra*, 3a-4a.

2. Respondent was indicted in the United States District Court for the District of Utah on one count of possession of cocaine with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He moved to suppress the cocaine on the ground that the traffic stop was a pretext for investigating an unrelated crime for which Officer Graham lacked reasonable suspicion. Respondent further contended that Officer Graham's questioning about the contraband was not justified by the stop. App., *infra*, 29a.

The district court rejected the pretext claim, finding that a reasonable officer would have made the traffic stop under the circumstances presented here. App., *infra*, 30a. The court, however, agreed with respondent's contention that Officer Graham's questioning violated the Fourth Amendment. Citing *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988), the district court held that because respondent had produced proof that he was entitled to operate the vehicle, Officer Graham could do no more than write a citation and send him on his way, absent reasonable suspicion of other criminal activity. The court held that, on the facts of this case, reasonable suspicion of other crimes was not present. App., *infra*, 31a-35a.

3. The court of appeals affirmed. While finding that the initial stop was valid, the court concluded that Officer Graham's questions were unlawful because they were unrelated to the rationale for the initial stop—*i.e.*, the issuance of a speeding ticket—and to the driver's right to operate the vehicle. In the court of appeals' view, "the officer making a traffic stop may request a driver's license and registration, run a computer check, and issue a citation." App., *infra*, 8a. But "[o]nce the driver has produced a valid license and proof that he is entitled to operate the car, 'he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning.'" *Ibid.* (quoting *Guzman*, 864 F.2d at 1519). The court rejected the argument that the questions were part of a consensual exchange between respondent and Officer Graham; in the court's view, Officer Graham's retention of respondent's license and registration deprived respondent of his freedom to leave. The court also held that the district court had not clearly erred in finding that respond-

ent's continued detention was unjustified by reasonable suspicion of criminal activity. *Id.* at 9a-11a. The court then remanded the case to the district court to determine whether respondent's ultimate consent to search the vehicle was "sufficiently an act of free will to purge the primary taint" of the unlawful detention. *Id.* at 11a-12a (quoting *Brown v. Illinois*, 422 U.S. 590, 602 (1975)).

4. The government petitioned for rehearing. The court denied the petition, but issued a supplementary opinion further explaining its decision. The court reiterated its holding that Officer Graham's brief questions were unlawful because "there was no objective reasonable suspicion to detain [respondent] for questioning about contraband." App., *infra*, 16a. The court went on to explain that although some Fourth Amendment intrusions may be lawful without any individualized reasonable suspicion, the governmental interest in detecting the unlawful transportation of alcohol, drugs, and weapons on the public highways did not justify the intrusion caused by the questions that Officer Graham had asked respondent during the traffic stop. *Id.* at 16a-23a.

The court acknowledged that the duration and intensity of the additional questions was analogous to the level of intrusion of the random sobriety checkpoint stops that this Court recently found reasonable in *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481, 2486 (1990). But because Officer Graham was "free to choose" which drivers to detain for further questioning, the court below regarded the "subjective intrusion" as being considerably greater than that incident to a routine checkpoint stop. App., *infra*, 18a-19a. While the court acknowledged the public's substantial interest in detecting illegal drugs and other contraband on the highways, it concluded that the

record did not contain evidence that the brief questioning of validly stopped motorists would be effective in detecting contraband. *Id.* at 20a-21a. Finally, the court held that the incidental intrusion in this case was greater than the intrusion of directing a validly stopped motorist to exit his or her vehicle for the safety of the officer—a practice that was approved, despite a lack of any reasonable suspicion of danger, in *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). App., *infra*, 21a-22a.

REASONS FOR GRANTING THE PETITION

The court of appeals adopted a rigid code of police conduct that forbids a police officer from extending a valid traffic stop long enough to ask a motorist a few brief “yes” or “no” questions concerning whether he or she is transporting dangerous contraband on the public highways. The court’s rigid prohibition on brief questions that are reasonably related to the safe and lawful operation of a motor vehicle cannot be reconciled with this Court’s decisions that permit an officer conducting a valid traffic stop to ask a motorist routine questions about his or her driver’s license, vehicle registration, and similar matters, even in the absence of suspicion of wrongdoing. See *New York v. Class*, 475 U.S. 106, 115 (1986); cf. *Delaware v. Prouse*, 440 U.S. 648, 659 (1979). The court’s condemnation of Officer Graham’s question about weapons, moreover, conflicts with this Court’s clear teaching that an officer conducting a routine traffic stop may take reasonable steps to ensure his or her own safety. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). In addition, the court below incorrectly struck the Fourth Amendment balance between the critical public interest in detecting drugs and other contraband on the public highways, see *Michigan*

Dep't of State Police v. Sitz, 110 S. Ct. at 2485-2486 (drunken driving); *NTEU v. Von Raab*, 489 U.S. 656, 668-669 (1989) (illegal drugs); *Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (concealed weapons), and the truly minimal intrusion that Officer Graham's questions represent, see *Pennsylvania v. Mimms*, 434 U.S. at 111; *United States v. Martinez-Fuerte*, 428 U.S. 543, 546-547, 560, 563-564 (1976).

1. The court of appeals required reasonable suspicion for Officer Graham's questions about contraband because, in its view, those questions were not reasonably related to the traffic stop. App., *infra*, 8a. This Court, however, has indicated that an officer may check a motorist's license, vehicle registration, and vehicle identification number as part of a traffic stop. *Class*, 475 U.S. at 115; cf. *Prouse*, 440 U.S. at 659. Moreover, the court of appeals indicated that Officer Graham acted constitutionally when he conducted an NCIC computer check to see if respondent's vehicle was stolen. App., *infra*, 8a. Thus, it is clear that, even absent reasonable suspicion, an officer may make brief inquiries to determine that the vehicle is not being operated in violation of law.

Officer Graham's questions were reasonably related to that same purpose. His questions pertaining to open containers of alcohol and illegal narcotics and paraphernalia for their use are reasonably related to the valid operation of the motor vehicle itself. See Utah Code Ann. § 41-6-44 (Supp. 1991) (unlawful to drive under the influence of alcohol or drugs); § 44-6-44.20 (Supp. 1991) (forbidding transportation of open containers in passenger compartment on highway); § 58-37-13(e) (Supp. 1991) (vehicles used to transport controlled substances are subject to forfeit-

ure; no property right exists in them).¹ An officer, moreover, must be able to inquire into possible reasons for the commission of a traffic offense, such as speeding. “[C]ommon sense and ordinary human experience,” *United States v. Sharpe*, 470 U.S. 675, 685 (1985), indicate that questions about the presence of open containers of alcohol, or illegal drugs and paraphernalia for their use, are reasonably related to ascertaining why a motorist was traveling at an unlawful and unsafe rate of speed. Such questions are also related to the officer’s task of determining whether it is safe for the motorist to resume his or her journey. Given “the slaughter on our highways, and * * * the danger posed to almost everyone by the driver who is under the influence of alcohol or other drug,” *Sitz*, 110 S. Ct. at 2488 (Blackmun, J., concurring in the judgment), it was entirely reasonable for Officer Graham to inquire briefly into those possible explanations for respondent’s speeding violation.

¹ Officer Graham asked respondent if his vehicle was carrying any open containers of alcohol, weapons, controlled substances or paraphernalia, or large quantities of cash (in excess of \$1000). Tr. 12. While carrying large quantities of cash itself is not unlawful, it is often associated with drug trafficking. See *United States v. Sokolow*, 490 U.S. 1, 8-9 (1989); Tr. 14. Numerous reported decisions catalogue seizures of large quantities of cash together with either drugs or drugs and weapons from motorists. See, e.g., *United States v. Ross*, 456 U.S. 798 (1982); *United States v. House*, 939 F.2d 659, 661 (8th Cir. 1991); *United States v. Cox*, 934 F.2d 1114, 1118 (10th Cir. 1991); *United States v. McDonald*, 933 F.2d 1519, 1520 (10th Cir.), cert. denied, 112 S. Ct. 270 (1991); *United States v. Wylie*, 919 F.2d 969, 971 (5th Cir. 1990); *United States v. Johnson*, 886 F.2d 1120, 1121 (9th Cir. 1989), cert. denied, 494 U.S. 1089 (1990); *United States v. Hardy*, 855 F.2d 753, 756 (11th Cir. 1988), cert. denied, 489 U.S. 1019 (1989); *United States v. Zambrana*, 841 F.2d 1320, 1324 (7th Cir. 1988).

Officer Graham's question regarding weapons was related to the traffic offense because it provided him with a basis for assuring his own safety in issuing the citation. As this Court has noted, an officer approaching a stopped car on a highway faces considerable risk of harm, and must be allowed to take reasonable steps to secure his or her own safety. *Mimms*, 434 U.S. at 110; *Class*, 475 U.S. at 116-119. Asking a motorist if he or she is transporting any concealed weapons in the vehicle may aid the officer in determining if the stop involves a security risk, and it is significantly less intrusive than an officer's direction that a motorist get out of his or her car while the officer conducts the traffic stop,² a procedure that this Court has upheld even in the absence of articulable grounds for suspicion that the motorist is armed or dangerous. *Mimms*, 434 U.S. at 109-111.

2. In a variety of contexts, this Court has declined to require reasonable suspicion to sustain minimal intrusions incidental to a valid stop. Consistent with the principle that Fourth Amendment analysis always turns on "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal privacy," *Mimms*, 434 U.S. at 109 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)), this Court weighs the incidental intrusion of the law enforcement practice at issue against the public interest served by it. See *Martinez-Fuerte*, 428 U.S. at 546-547, 560, 563-564; *Mimms*, 434 U.S. at 109-111;

² An officer's unexplained directive for a motorist to exit his or her vehicle not only creates the potential concern that the officer suspects wrongdoing, but also suggests the possibility that the officer may be anticipating some sort of physical confrontation, such as taking the motorist into custody.

Class, 475 U.S. at 118-119.³ Because the decision below hampers legitimate law enforcement efforts without making any material contribution to legitimate privacy interests, review by this Court is warranted.

a. As discussed, Officer Graham's brief questions were reasonably calculated to determine if respondent was transporting open containers of alcohol, illegal drugs and paraphernalia for their use, or concealed weapons on the public highways. The public interest in detecting the transportation of such contraband on the highways is substantial.⁴ This Court

³ This Court has taken a similar approach in other Fourth Amendment contexts as well. See, e.g., *Michigan v. Summers*, 452 U.S. 692, 702-705 (1981) (upholding detention of occupant of home while police execute warrant to search that home); *New York v. Belton*, 453 U.S. 454, 460-461 (1981) (police may search entire passenger compartment of vehicle, including containers, incident to lawful custodial arrest of vehicle's occupant); *United States v. Robinson*, 414 U.S. 218, 234-235 (1973) (search incident to arrest for driving without a license).

⁴ The court of appeals based its judgment in part on the lack of empirical evidence in the record that the brief questioning of validly stopped drivers about contraband is "effective." App., *infra*, 21a. But as this Court has observed, "common sense and ordinary human experience must govern" the inquiry into the reasonableness of a detention. *Sharpe*, 470 U.S. at 685. As this case and numerous other cases confirm, see, e.g., *United States v. Turner*, 928 F.2d 956, 958-959 (10th Cir.), cert. denied, 112 S. Ct. 230 (1991); *Guzman*, 864 F.2d at 1519-1520, the brief questioning of validly stopped motorists is effective in detecting the transportation of contraband on the public highways. While some motorists who may be carrying contraband or weapons may be able to give convincing disclaimers when questioned by the police, others turn out to be very unconvincing liars. As a result, an officer can often obtain important information, with very little additional intrusion, by being able to observe a validly

has recently noted "the magnitude of the drunken driving problem" and the many instances of "alcohol-related death and mutilation on the Nation's roads." *Sitz*, 110 S. Ct. at 2485. In addition, narcotics smuggling has caused "a veritable national crisis in law enforcement." *Von Raab*, 489 U.S. at 668 (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985)). "[T]hrough the adroit selection of source locations, smuggling routes, and increasingly elaborate methods of concealment, drug traffickers have managed to bring into this country increasingly large quantities of illegal drugs." *Id.* at 669. Finally, an officer approaching a person seated in an automobile faces an "inordinate risk" of harm; a "significant percentage" of police murders occur during minor traffic stops. *Mimms*, 434 U.S. at 110; *Michigan v. Long*, 463 U.S. 1032, 1049 (1983); *Adams v. Williams*, 407 U.S. 143, 147-148 & n.3 (1972). Thus, the government has a significant interest in detecting concealed weapons in stopped vehicles.

b. What is "critical," *Class*, 475 U.S. at 118, however, is the minimal degree of the incidental intrusion that the court of appeals condemned. The court below indicated that an officer may ask a validly stopped motorist the same four or five brief questions concerning contraband while awaiting the results of the NCIC check. App., *infra*, 9a n.2 (citing *United States v. Morales-Zamora*, 914 F.2d 200 (10th Cir. 1990)). Moreover, if the officer has returned the driver's license and registration, the officer is again free to inquire about contraband. *United States v. Turner*, 928 F.2d 956, 959 (10th Cir.), cert. denied,

stopped motorist's reactions to a few brief, direct questions about the presence of contraband in the motorist's vehicle.

112 S. Ct. 230 (1991); *United States v. Werking*, 915 F.2d 1404, 1409 (10th Cir. 1990). Hence, the intrusion that the court of appeals found unconstitutional consists of the brief period that an officer extends a traffic stop by asking four or five questions concerning dangerous contraband after the NCIC check has come back but before the officer has returned the driver's license and registration.⁵

The court of appeals acknowledged that the scope of the "objective intrusion"—as measured by the duration and intensity of Officer Graham's questions—was "not unlike" other intrusions that this Court has upheld in the absence of reasonable suspicion. App., *infra*, 18a (citing *Sitz*, 110 S. Ct. at 2484, 2486 (upholding questioning of approximately 25 seconds at sobriety checkpoint)). The court, however, found that the brief delay to ask the questions here caused an unacceptably high "subjective intrusion" because of "the fear and surprise engendered in law abiding motorists" by the government's action. *Ibid.* That subjective intrusion was unacceptable, in the court's view, because Officer Graham was free to select which motorists he would ask about contraband. App., *infra*, 18a-19a

In view of the *de minimis* intrusion to which the court below objected, however, that concern is misplaced. The court asserted that the questions concerning contraband would engender fear and resentment on the part of lawful motorists who were validly stopped for traffic offenses. App., *infra*, 20a. Even

⁵ In this case only five minutes elapsed between the beginning of the stop and Officer Graham's request for consent to search the vehicle. Tr. 18. That time included aspects of the stop of which the court of appeals approved, such as Officer Graham's questioning of respondent about the fact that the car was registered in someone else's name. *Ibid.*

assuming that were correct,⁶ however, it would be beside the point. As discussed, the court suggested that Officer Graham's questions about contraband would have been permissible if asked while awaiting the NCIC check. *Id.* at 9a n.2 (citing *United States v. Morales-Zamora*, *supra*). Thus, the court did not condemn official discretion to ask a validly stopped motorist brief questions concerning dangerous contraband, but condemned official discretion to delay a traffic stop, however briefly, to ask such questions.

By condemning the exercise of any official discretion with respect to ~~so~~ minor an intrusion, the court of appeals brought itself into conflict with the decisions of this Court. Thus, in *Martinez-Fuerte*, the Court approved the secondary referral of a small number of motorists who were already validly stopped at an immigration checkpoint, even though that referral involved three to five minutes of additional questioning and was not based upon "any articulable suspicion." 428 U.S. at 547, 560, 563. The Court explained that "[a]s the intrusion here is sufficiently minimal that no particularized reason need exist to justify it, we think it follows that the * * * officers must have wide discretion in selecting the motorists

⁶ From the perspective of the "lawful traveler," *Martinez-Fuerte*, 428 U.S. at 558, the brief and direct questions asked by Officer Graham should cause little concern or fear. A traffic stop typically involves inquiries into such matters as the validity of the motorist's license and the ownership and registration status of the vehicle. In that context, a motorist readily understands that nonaccusatory inquiries are not unusual as part of a traffic stop. Moreover, the questions asked by Officer Graham related to diverse categories of contraband. A lawful motorist, therefore, would quickly be able to perceive that the questions were genuinely inquisitive, and not accusatory.

to be diverted for the brief questioning involved." *Id.* at 563-564. By the same token, "officers may * * * exercise their discretion to require a driver who commits a traffic violation to exit the vehicle even though they lack any particularized reason for believing that the driver possesses a weapon." *Class*, 475 U.S. at 115 (citing *Mimms*, 434 U.S. at 108-111). Although official discretion is involved in such cases, the "additional intrusion can only be described as *de minimis*." *Mimms*, 434 U.S. at 111.

3. This case raises a question of substantial importance concerning the ability of law enforcement officers to detect dangerous contraband on public highways.⁷ The court of appeals' opinion creates a laby-

⁷ Related issues include whether an officer may conduct a warrant check during a routine traffic stop, compare, *e.g.*, *United States v. Luckett*, 484 F.2d 89, 90-91 (9th Cir. 1973) (warrant checks may not extend time necessary to issue routine traffic citation), and *People v. McGaughran*, 25 Cal. 3d 577, 584-587, 601 P.2d 207, 211-213, 159 Cal. Rptr. 191, 195-197 (1979) (same), with *People v. Eyler*, 132 Ill. App. 3d 792, 798, 477 N.E.2d 774, 780 (1985) (warrant check valid part of *Terry* stop), cert. denied, 481 U.S. 1007 (1987), and *Storm v. State*, 736 P.2d 1000, 1001 (Okla. Crim. App. 1987) (routine warrant check permissible as part of traffic stop); whether an officer may extend a routine traffic stop to make a brief visual inspection of the interior of the vehicle, compare, *e.g.*, *United States v. Daniel*, 725 F. Supp. 532, 533 (M.D. Ga. 1989) (detention for visual inspection of passenger invalid), with *State v. Jackson*, 296 Or. 430, 438, 677 P.2d 21, 25-26 (1984) (visual inspection with flashlight valid *de minimis* additional intrusion); and whether an officer may require a motorist to show legally required proof of financial responsibility as part of a traffic stop, see, *e.g.*, *Sherman v. Babbitt*, 772 F.2d 1476, 1478 (9th Cir. 1985). This Court's guidance on the issue presented in this case will assist the lower courts in resolving many of these issues.

rinth of arbitrary Fourth Amendment distinctions that will ensnare even the most prudent officer.⁸ The court's ruling offers no guidance to officers in determining which inquiries are permissible, absent reasonable suspicion, and which are not. Here, the court indicated that questions concerning the presence of dangerous contraband in respondent's vehicle were "unrelated" to his speeding offense or his right to operate the vehicle. App., *infra*, 8a. But those questions had a very direct bearing on whether respondent was operating his vehicle in violation of the law, on the reasons for respondent's unlawful and unsafe rate of speed, and on Officer Graham's own safety in making the stop and writing the citation. See pp. 7-9, *supra*.

At the same time, the court of appeals has indicated that an officer conducting a traffic stop may run an NCIC check to see if a vehicle is stolen, App.,

⁸ The court of appeals' categorical legal rule limiting the scope of valid traffic stops would apply to future cases within the Tenth Circuit's jurisdiction, regardless of the outcome of the hearing on remand concerning whether respondent's consent to the search of his vehicle dissipated the taint of the Fourth Amendment violation found here. Indeed, the decision below was itself an application of the Tenth Circuit's prior decision in *United States v. Guzman*, *supra*. In *Guzman*, 864 F.2d at 1521, as in this case, App., *infra*, 11a-12a, the court of appeals remanded the case to the district court because the latter had not addressed whether the motorist's consent to search was sufficiently an act of free will to purge the primary taint of the incremental delay in the stop. The rigid code of police conduct embraced in *Guzman* and in this case not only unreasonably hampers legitimate law enforcement efforts on a daily basis, but also materially enhances the risks faced by officers in the field, who may not ask a validly stopped motorist if there is a concealed weapon in the motorist's vehicle.

infra, 7a-8a, or may ask a motorist about his or her travel plans, *United States v. Rivera*, 867 F.2d 1261, 1263 (10th Cir. 1989).⁹ Because such inquiries, like those held unconstitutional here, are designed to elicit information regarding whether a traffic offense indicates more serious wrongdoing, it is impossible to discern any principle by which an officer may determine what is, or is not, related to a speeding offense or to the driver's right to operate a vehicle.¹⁰ Hence, without any appreciable contribution to legitimate privacy interests, the rigid rules established by the Tenth Circuit have sown unnecessary and burdensome confusion in the law governing routine traffic stops.

Finally, because questions about contraband would be valid if asked while the officer was awaiting an NCIC check, the Tenth Circuit presumably must now examine whether the officer has unreasonably delayed the processing of the citation to ask the motorist about contraband. Thus, instead of giving his or her full attention to circumstances that alert a trained and experienced officer to the possibility of wrongdoing or danger, the officer must now give constant attention to whether his or her questions risk delaying the processing of the citation. Alternatively, of course, the officer may stop before asking any ques-

⁹ Officer Graham asked respondent where his trip originated and what his destination was. App., *infra*, 2a. The court did not address the validity of that question in this case.

¹⁰ For example, the court of appeals in *Guzman* held that, absent reasonable suspicion, an officer may not look at a vehicle's odometer during the course of a valid traffic stop. 864 F.2d at 1519. Moreover, while the court below stated that "ordinary conversation" is permissible, App., *infra*, 22a n.3, the court did not suggest how officers in the field may determine when they have crossed the line separating ordinary conversation from unlawful questioning.

tion, and attempt to make a mental calculation of whether he or she has reasonable suspicion to ask *that particular question*. Such a requirement, however, not only is impracticable, but is inconsistent with the Fourth Amendment principles laid down by this Court. Cf. *Berkemer v. McCarty*, 468 U.S. 420, 435 n.22 (1984) ("by requiring a policeman conversing with a motorist constantly to monitor the information available to him to determine when it becomes sufficient to establish probable cause, the rule * * * would be extremely difficult to administer"); *United States v. Robinson*, 414 U.S. 218, 235 (1973) (an "officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search"). Review by this Court is warranted to restore predictability and rationality to the rules that guide officers in conducting routine traffic stops.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR

Solicitor General

ROBERT S. MUELLER, III

Assistant Attorney General

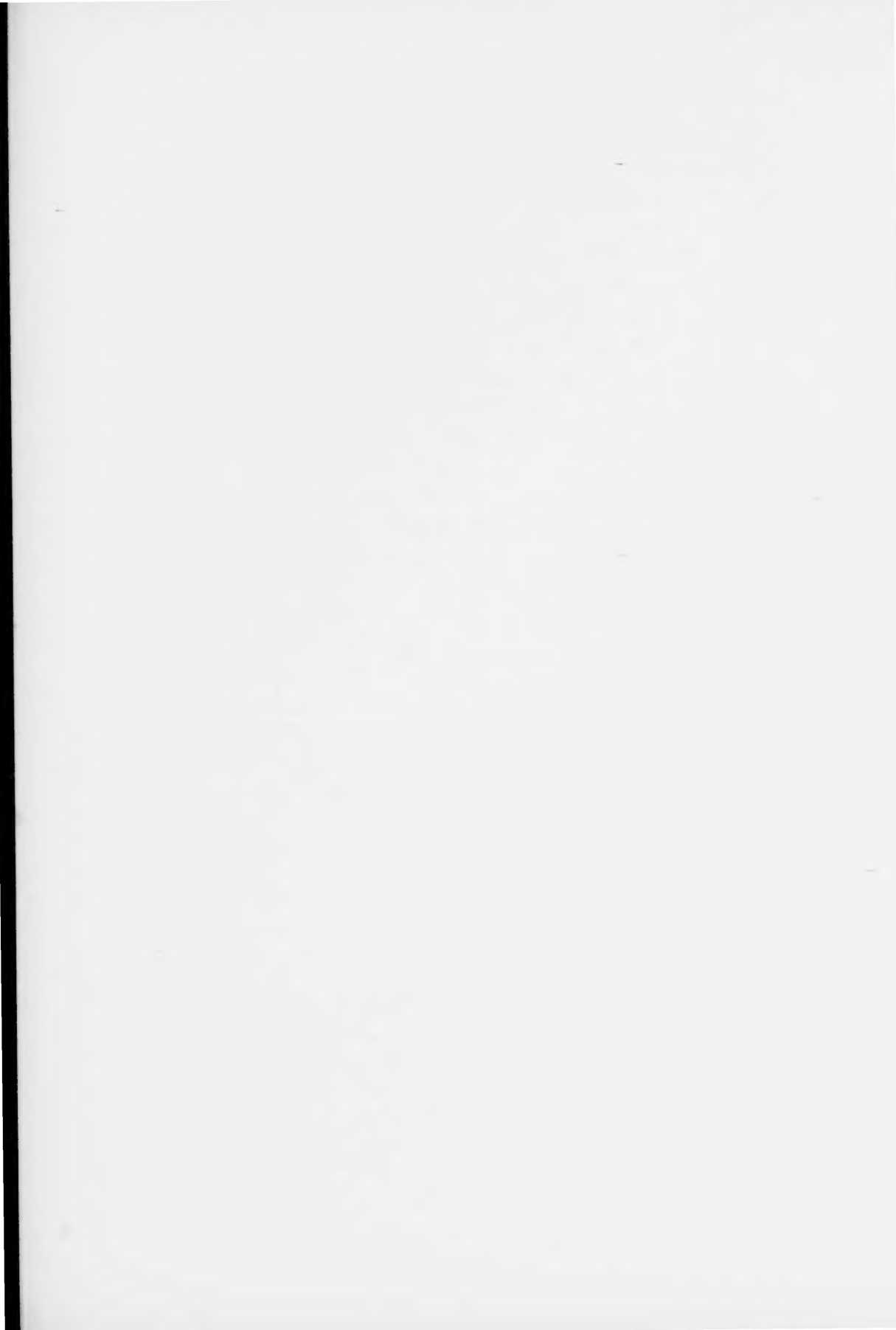
WILLIAM C. BRYSON

Deputy Solicitor General

JOHN F. MANNING

Assistant to the Solicitor General

DECEMBER 1991



APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-4067

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

RALPH JOSEPH WALKER, DEFENDANT-APPELLEE

[Filed May 7, 1991]

Appeal from the United States District Court
for the District of Utah
(D.C. No. 90-CR-13)

Before SEYMOUR and EBEL, Circuit Judges, and
BROWN, District Judge.*

BROWN, District Judge.*

In this appeal, the Government challenges the district court's order suppressing cocaine found in the defendant's car. The district court granted the defendant's motion to suppress the evidence upon find-

* The Honorable Wesley E. Brown, United States District Senior Judge for the District of Kansas, sitting by designation.

ing that the defendant had been illegally detained and questioned after he was stopped for speeding on a Utah highway. For the reasons set forth herein, we remand the case to the district court for further proceedings.

The pertinent facts as found by the district court are as follows. On January 10, 1990, the defendant was traveling west on Interstate 70 in Emery County, Utah, in a 1988 Cadillac. Officer Richard Graham of the Emery County Sheriff's Department was traveling east on the interstate. Officer Graham clocked the defendant's car going 67 miles per hour in a 55 mile per hour speed zone. Graham made a "u-turn" and pulled the defendant over.

Before getting out of his car, Graham ran an NCIC (National Crime Information Center) check on the defendant's car and was informed that it had not been reported stolen. Graham approached the defendant's car and told the defendant that he had been clocked speeding. Graham asked the defendant for a driver's license and vehicle registration and also asked the defendant where he was coming from and his destination. The defendant stated that he was coming from Kansas City and was on his way home. The defendant asked permission to get out of his car so he could get his license out of his back pocket. As the defendant stepped out of his car, he gave Graham the vehicle registration. The defendant was nervous. His hands shook. It was difficult for him to retrieve his license from the small compartment in his wallet. He retrieved the license and gave it to Officer Graham.

The license was issued in the defendant's name. It identified him and established his right to operate a motor vehicle. The car was registered in the name

of Marian Smith. Officer Graham questioned the defendant about the registration. The defendant told Graham that Marian Smith was his sister and that he was driving the car with her permission. It was later established that the defendant had subleased the vehicle from Ms. Smith. A copy of the sublease agreement was in the glove compartment of the vehicle at the time the defendant was stopped.

While retaining the defendant's license and registration, Officer Graham asked the defendant a number of specific questions unrelated to the traffic stop. He asked if there were any weapons in the vehicle, if there were any open containers of alcohol in the vehicle, and if there was any controlled substance or paraphernalia of any kind in the vehicle. Graham also asked if the defendant were carrying any large quantities of cash. The defendant answered "no" to each question except for stating that he had about \$1600.00 in cash in the glove compartment and about \$150.00 cash in his pocket. While still holding the defendant's license and registration, and without discussing the speeding violation or writing a citation or informing the defendant that he was free to go, Officer Graham asked the defendant if he could search the vehicle for the items about which he had inquired. The defendant responded, "Sure, go ahead." Officer Graham asked the defendant to stand by the front fender of the car, which he did. Graham patted the defendant down, checking under his sweater, the top of his slacks, and down his legs. Graham then searched the passenger compartment of the car. He found two rolls of cash in the glove compartment. Graham asked for and received the key to the trunk. Upon opening the trunk, he noticed two packages wrapped in clear plastic tape near the back seat.

They appeared to be kilogram packages of cocaine. Graham then arrested the defendant. A search warrant was later obtained which led to the discovery of 86 kilogram packages of cocaine in the car.

Relying on *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988), the district court determined that Officer Graham's continued detention of the defendant in order to ask him intrusive questions unrelated to the traffic stop was a violation of the defendant's Fourth Amendment rights. The district court found that the defendant's nervousness did not create an objectively reasonable suspicion of criminal activity that would justify the detention. The court further indicated that the defendant had produced sufficient proof showing he was entitled to operate the car such that no reasonable suspicion of criminal activity arose from the fact that the car was not registered to the defendant. Having found that the detention and questioning violated the defendant's constitutional rights, the district court suppressed the evidence found in the car. The court did not address the Government's argument that the search was justified by the defendant's consent.

The appellant United States makes several arguments on appeal. First, appellant argues that the district court erred by finding that the officer had to have reasonable suspicion before asking questions of the defendant unrelated to the traffic stop. Appellant contends that Officer Graham's conduct was reasonable when judged by the totality of the circumstances. Alternatively, appellant contends that Officer Graham's detention and questioning of the defendant were based on a reasonable suspicion of criminal activity and were therefore lawful. Finally, appellant contends that the district court erred by failing

to address the issue of consent. We affirm the district court insofar as it found that the detention violated the defendant's Fourth Amendment rights; however, we find that under *Guzman* the district court must address the issue of whether the search was nonetheless justified by the defendant's consent.

In reviewing appellant's claims, we do not substitute our judgment for the factual findings of the district unless those findings are clearly erroneous. *United States v. Werking*, 915 F.2d 1404, 1406 (10th Cir. 1990). At a hearing on a motion to suppress, the credibility of the witnesses and the weight to be given the evidence, together with the inferences, deductions and conclusions to be drawn from the evidence, are all matters to be determined by the trial judge. *Id.* (citing *United States v. Pappas*, 735 F.2d 1232, 1233 (10th Cir. 1984)). Accordingly, we review the evidence in a light favorable to the district court's determination. *Id.* The ultimate determination of reasonableness under the Fourth Amendment, however, is a determination of law that we review *de novo*. *United States v. Pena*, 920 F.2d 1509, 1513-14 (10th Cir. 1990).

The Fourth Amendment protects against unreasonable searches and seizures. The stopping of a vehicle and the detention of its occupants constitute a "seizure" within the meaning of the Fourth Amendment. An ordinary traffic stop is a limited seizure, however, and is more like an investigative detention than a custodial arrest. *See Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) ("[T]he usual traffic stop is more analogous to a so-called 'Terry stop' . . . than to a formal arrest.") Accordingly, we have judged the reasonableness of traffic stops under the principles pertaining to investi-

gative detentions announced in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). *United States v. Guzman*, 864 F.2d 1512, 1519 (10th Cir. 1988).

The Supreme Court has adopted a dual inquiry for evaluating the reasonableness of investigative detentions. Under this approach, the court determines “whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” *Terry*, 392 U.S. at 20. As the district court here recognized, we applied this inquiry in *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988), a case involving a routine traffic stop. In *Guzman*, a state police officer stopped a vehicle because the driver and a passenger in the car were not wearing their seat belts. The driver produced documents that satisfied the officer as to the driver’s right to operate the vehicle. Although the officer had no reasonable suspicion of criminal activity other than a seat belt violation, he decided to conduct a further investigation and proceeded to ask the occupants a series of intrusive questions unrelated to the traffic stop. He did not return the defendant’s driver’s license. We concluded that the officer’s detention of the occupants to ask these intrusive questions was unreasonable. We stated:

An officer conducting a routine traffic stop may request a driver’s license and vehicle registration, run a computer check, and issue a citation. * * * When the driver has produced a valid license and proof that he is entitled to operate the car, he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning.

Id. at 1519 (citations omitted). We noted that although the detention was of a relatively short duration, “it nevertheless unreasonably extended beyond the length necessary for its only legitimate purpose—the issuance of a citation for a seat belt violation.” *Id.* at 1519 n.8

There is no question that the initial stop of the defendant’s vehicle in the instant case was justified. The district court concluded that the defendant had been lawfully stopped for speeding. After being stopped, the defendant produced a valid driver’s license that established his right to operate a motor vehicle. The defendant also produced the registration slip for the car. The district court concluded that under the circumstances the defendant had produced sufficient proof to show he was entitled to operate the car. The car was registered to Marian Smith, whom the defendant identified as his sister. An NCIC check indicated to Graham that the car was not stolen. Officer Graham did not pursue the matter of the registration any further and his testimony shows that he was satisfied as to the defendant’s right to operate the car. Graham gave no testimony indicating that he suspected that the defendant was involved in any criminal activity. *Cf. United States v. Pena*, 920 F.2d 1509, 1514 (10th Cir. 1990), *petition for cert. filed*, Mar 4, 1991, No. 90-7324 (Circumstances, including the fact that the driver did not recognize the name of the registered owner of the vehicle, justified a detention to investigate whether vehicle was stolen); *United States v. Obregon*, 748 F.2d 1371, 1376 (10th Cir. 1984) (The driver was not listed as an authorized operator on a rental agreement and was unable to provide a means of contacting the lessee). Had Officer Graham been

concerned about the registration and requested further proof, the defendant could have produced a contract showing that he subleased the car from Ms. Smith. In this case, as in *Guzman*, the defendant produced sufficient proof that he was entitled to operate the car.

Instead of issuing a citation, Officer Graham decided to detain the defendant and conduct an inquiry into matters unrelated to the traffic stop. As we stated in *Guzman*, the officer making a traffic stop may request a driver's license and registration, run a computer check, and issue a citation. Once the driver has produced a valid license and proof that he is entitled to operate the car, "he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning." *Guzman*, 864 F.2d at 1519. *See also Pena, supra*. In this case, as in *Guzman*, the detention of the defendant unreasonably extended beyond the length necessary for the issuance of a citation.¹ The officer detained the defendant to ask him questions unrelated to the speeding infraction or to the defendant's right to operate the car. Thus, the detention was not reasonably related in scope to the circumstances that justified the interference in the first place. As such, it was an unreasonable seizure under the Fourth Amendment. *Cf. United States v. Sharpe*, 470 U.S. 675, 105 S.Ct. 1568, 84 L.E.2d 605 (1985) ("Clearly this case does not involve any delay unnecessary to the legitimate investigation of the law enforcement officers"). *See also United States v.*

¹ Although neither party has addressed the issue, it appears that Utah law does not allow an officer in these circumstances to make a custodial arrest for a speeding violation. *See Utah Code Ann. § 77-7-18 et seq.*

Morales-Zamora, 914 F.2d 200, 203 (10th Cir. 1990) (At a roadblock to check drivers' licenses and registrations, a canine sniff of the defendants' vehicle was not an unlawful detention because agents completed the canine sniff before another agent completed his examination of the defendants' documents).²

Appellant's effort at distinguishing the *Guzman* case is ineffectual. Without relating any significant factual differences between the two cases, appellant simply asserts that the conduct of the officer in *Guzman* was unreasonable whereas Officer Graham's conduct was reasonable. We see no facts that would make the rule of *Guzman* inapplicable here. Notwithstanding *Guzman*, appellant insists that this court has "consistently recognized the appropriateness of a request to search made by a police officer during a valid traffic stop, without a requirement of independent justification for the request." App. Br. at 6. Appellant characterizes the type of questioning that occurred here as a consensual encounter that is not governed by the Fourth Amendment. We have noted on several occasions that the Fourth Amendment's ban on unreasonable seizures does not prohibit a police officer from asking a motorist questions if the encounter is a consensual one. "Because an individual is free to leave at any time during such an encounter, he is not 'seized' within the meaning of the fourth amendment." *United States v. Werking*, 915 F.2d

² Under the reasoning of *United States v. Morales-Zamora*, 914 F.2d 200 (10th Cir. 1990), our determination that the defendant was unlawfully detained might be different if the questioning by the officer did not delay the stop beyond the measure of time necessary to issue a citation. For example, this case would be changed significantly if the officer asked the same questions while awaiting the results of an NCIC license or registration inquiry.

1404, 1408 (10th Cir. 1990). See also *United States v. Turner*, 1991 U.S. App. LEXIS 4361 (10th Cir., Mar. 20, 1991); *United States v. Deases*, 918 F.2d 118, 122 (10th Cir. 1990), *petition for cert. filed*, Feb. 22, 1991, No. 90-7283. This line of cases does not help appellant's cause, however, because the encounter in this case was clearly not consensual. Officer Graham retained the defendant's driver's license and registration during the entire time he questioned the defendant. The district court found that the defendant was not free to leave and that his detention was a seizure within the meaning of the Fourth Amendment. See *Turner, supra*; *Werking*, 915 F.2d at 1409. These findings are supported by the evidence.

Appellant next contends that the continuing detention of the defendant was justified by a reasonable suspicion of criminal activity. The Government points out that when the defendant was stopped he was nervous and his hands shook. Appellant states that we have previously upheld investigative detentions based solely on an individual's "nervousness." (*citing United States v. Benitez*, 899 F.2d 995, 997 (10th Cir. 1990)). As an initial matter, we note that although Officer Graham indicated that the shaking of the defendant's hands was unusual, he did not testify that it caused him to suspect that the defendant was involved in any kind of criminal activity. Moreover, the district court here concluded that under the circumstances the defendant's nervousness did not give rise to an objective reasonable suspicion. We must accept this determination unless it is clearly erroneous. *United States v. Turner*, 1991 U.S. App. LEXIS 4361 (10th Cir., Mar. 20, 1991). The significance of the defendant's actions must be judged

in light of all the circumstances. *Cf. Turner, supra* ("Defendant's increased nervousness added to the officer's suspicion, justifying the request to search the car.") In this case the defendant's hands shook after he had been stopped by a police officer for speeding. The district court heard the testimony of the witnesses and was in a better position than we to judge the extent and significance of the defendant's nervousness. We are not convinced after reviewing the record that the district court's finding on this issue is clearly erroneous.³

Although we conclude that the defendant's Fourth Amendment rights were violated by the detention, we agree with appellant that the district court should have addressed the issue of the defendant's consent to the search of his car. In *Guzman* we noted that consent given following a Fourth Amendment violation may be valid if it is voluntary in fact. *Guzman*, 864 F.2d at 1520. If the consent is not sufficiently an act of free will to purge the primary taint of the illegal detention, however, it must be suppressed as "fruit of the poisonous tree." *United States v. Maez*, 872 F.2d 1444, 1453 (10th Cir. 1989), *cert. denied*, 111 S.Ct. 1005 (1991). Voluntariness is a question of fact to be determined from the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

In *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) the Supreme Court cited three

³ The general term "nervousness" encompasses an almost infinite variety of behaviors. No doubt there are circumstances in which an individual's nervous behavior would give rise to a reasonable suspicion of criminal activity. We find only that the district court's determination that it did not do so here is not clearly erroneous.

factors relevant to the determination of whether evidence obtained from a suspect was “sufficiently an act of free will to purge the primary taint” of an illegal arrest. These factors take into account the interests underlying the Fourth Amendment, including the concern that evidence not be obtained by exploitation of illegal police conduct. *Brown*, 422 U.S. at 602-04. In *Guzman*, we directed the district court to consider these “*Brown* factors” upon remand in making its determination of whether the consent to search was voluntary. *Guzman*, 864 F.2d at 1521.

We likewise remand this case to the district court for findings on the issue of voluntariness, with directions to consider the factors articulated in *Brown*. See *United States v. Carson*, 793 F.2d 1141, 1152 (10th Cir.), *cert. denied*, 479 U.S. 914 (1986). The district court should examine the totality of the circumstances surrounding the defendant’s consent, focusing on: the temporal proximity of the illegal detention and the consent, any intervening circumstances, and, particularly, the purpose and flagrancy of the officer’s unlawful conduct. Cf. *Brown*, 422 U.S. at 603-04. As always, the burden of proving the voluntariness of consent is on the Government. *Schneekloth*, 412 U.S. at 222.

The order of the district court is VACATED and the case is REMANDED for further proceedings.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-4067

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

RALPH JOSEPH WALKER, DEFENDANT-APPELLEE

ORDER

Filed August 13, 1991

Before HOLLOWAY, Chief Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, and EBEL, Circuit Judges, and BROWN, District Judge.*

Appellant's [*sic*] filed a petition for rehearing and suggestion for rehearing en banc, and by separate order the panel denied the petition for rehearing.

* The Honorable Wesley E. Brown, United States District Senior Judge for the District of Kansas, sitting by designation.

It was submitted to the panel judges and to all other judges of the court in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-4067

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

vs.

RALPH JOSEPH WALKER, DEFENDANT-APPELLEE

ORDER ON PETITION FOR REHEARING

Filed August 13, 1991

Before SEYMOUR and EBEL, Circuit Judges, and
BROWN, District Judge.*

BROWN, District Judge.

This matter is before the panel on appellant's petition for rehearing. The relevant facts were outlined in the panel's opinion, *United States v. Walker*, No. 90-4067 (10th Cir. May 7, 1991), and will not

* The Honorable Wesley E. Brown, United States District Senior Judge for the District of Kansas, sitting by designation.

be repeated here. Appellant contends that in the initial opinion we erroneously applied a "bright line" rule that was contrary to established Fourth Amendment precedent. We disagree. The principle applied in this case came directly from *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and its progeny, which established that the Fourth Amendment usually requires some degree of individual suspicion amounting to an objectively reasonable suspicion of criminal activity in order to justify even a temporary seizure for questioning. We found that the seizure in the instant case was not reasonably related in scope to the circumstances that justified the detention in the first place (a speeding violation), and we therefore concluded that it was unreasonable under *Terry* because there was no objective reasonable suspicion upon which to detain the defendant for questioning about contraband. In doing so, we reached the same conclusion reached by the court under similar circumstances in *United States v. Guzman*, 864 F.2d 1512 (10th Cir. 1988). Although appellant again contends that there are "several important factual differences" between the instant case and *Guzman*, appellant does not explain how *Guzman* differs in any material respect from this case. Similarly, we find no conflict between the rule applied in the instant case and other Tenth Circuit decisions cited by appellant.

The government correctly points out, however, that the Supreme Court has recognized that in certain limited circumstances the government's interest in law enforcement may justify an intrusion on privacy without any measure of individualized suspicion. See *Treasury Employees v. Von Raab*, 489 U.S. 656, 668, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). Specifi-

cally, the Court has applied this principle in several cases dealing with stops of motorists on public highways. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); *Michigan State Police v. Sitz*, 110 L.Ed.2d 412 (1990). See also *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). Upon further review of appellant's argument, it appears that the government raised an issue in this case that was not raised in *Guzman*¹: that holding the defendant to ask him questions about contraband was reasonable—not because it was reasonably related to the initial justification for the stop—but because the special needs of the government in detecting drug traffickers outweighed the brief intrusion on the defendant's liberty caused by detaining him for a few questions. In our initial opinion, we dealt only with the question of whether the detention of the defendant extended beyond what was reasonably necessary to issue a traffic citation. In doing so, we failed to address appellant's argument that the detention was lawful even in the absence of any reasonable suspicion.

In support of its argument, appellant cites *Michigan State Police v. Sitz*, *supra*, and *Pennsylvania v. Mimms*, 434 U.S. 106 (1977). In *Sitz*, the Supreme Court upheld the validity of a sobriety checkpoint operated by the Michigan State Police. In that case, a checkpoint to detect drunk drivers was established at a selected site on a state road. All motorists traveling through this checkpoint were briefly detained while officers asked the drivers a few questions and looked for signs of intoxication. The Su-

¹ The Supreme Court's opinion in *Michigan State Police v. Sitz*, *supra*, was issued after our decision in *Guzman*.

preme Court rejected an argument from motorists who had been stopped at the checkpoint that the detention constituted an unreasonable seizure under the Fourth Amendment. The Court found that the seizure was reasonable even though the motorists were stopped in the absence of any individualized suspicion because the state's interest in reducing drunk driving and the harms associated with it outweighed the measure of the intrusion on the motorists who were stopped briefly at the checkpoint.

The checkpoint cases cited by appellant do not lead to the conclusion that the seizure in the instant case was reasonable. In *Sitz*, the Court found that the level of intrusion on motorists stopped at a sobriety checkpoint was slight. The Court reached this conclusion by examining what it called the level of "objective" and "subjective" intrusion on the motorist. The objective intrusion was gauged by the duration of the seizure and the intensity of the investigation. It is true that the duration of the seizure in the instant case (a few minutes at most) and the intensity of the investigation (four or five questions relating to contraband) are not unlike those found in *Sitz*. The so-called subjective intrusion in this case, however, differs markedly from that found in *Sitz*. One factor in this subjective inquiry is the fear and surprise engendered in law abiding motorists by the nature of the detention. *Sitz*, 110 L.Ed.2d at 421. As noted in *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979), this type of concern is appreciably less in the case of a checkpoint stop than it is when an officer makes a sporadic or random decision to detain an individual. There is nothing in the record before us to indicate that the officer's discretion in this case was constrained in any

way with regard to which traffic violators would be detained for additional questioning about contraband. Although the subjective intrusion may be somewhat lessened by the fact that such questioning only occurred after a motorist had been lawfully detained in the first instance for a traffic violation, the officer was apparently free to choose which individuals would be detained for additional questioning and which individuals would not be. *Cf. Prouse*, 440 U.S. at 661 ("This kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.") In terms of the subjective intrusion on a motorist stopped for a traffic infraction, the record in this case indicates that the seizure at issue more closely resembled the type of random "roving patrol" denounced in *United States v. Brignoni-Ponce*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) than the systematic checkpoint that the Court approved of in *Sitz*. *Cf. Prouse*, 440 U.S. at 657 ("We cannot assume that the physical and psychological intrusion visited upon the occupants of a vehicle by a random stop to check documents is of any less moment than that occasioned by a stop by border agents on roving patrol. * * * For Fourth Amendment purposes, we also see insufficient resemblance between sporadic and random stops of individual vehicles making their way through city traffic and those stops occasioned by roadblocks where all vehicles are brought to a halt or to a near halt, and all are subjected to a show of the police power of the community.") Moreover, the questioning that took place here cannot be characterized as idle conversation; it clearly was directed toward the motor-

ist's possible involvement in serious criminal activity unrelated to the speeding violation.² We think this type of questioning—about matters unrelated to the reason for the stop—would naturally engender fear and resentment in otherwise law-abiding citizens who expect to be detained briefly for the purpose of receiving a traffic citation. *Cf. Berkemer v. McCarty*, 468 U.S. 420, 439, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) (The ordinary traffic stop is “nonthreatening” because the individual will be detained briefly while the officer conducts an inquiry reasonably related in scope to the justification for the stop).

We recognize that the government has a significant interest in preventing the transportation and distribution of illegal drugs and other contraband. The question remains whether the method of furthering that interest that was used in the present case justifies the intrusion upon those Fourth Amendment interests outlined above. We find that on the record before us it does not. As previously noted, the lack of any constraint on an officer's decision to detain some individuals and to let others go creates a situation ripe for abuse. Such unfettered discretion undermines the liberty and privacy interests protected by the Fourth Amendment. *Cf. Brignoni-Ponce*, 422 U.S. at 883 (Even though the intrusion incident to a stop by border agents to detect illegal aliens is modest, it is unreasonable under the Fourth Amendment to make such stops on a random basis) and *Martinez-Fuerte*, 428 U.S. at 566-67 (“The principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope

² The Government did not argue that the circumstances in the instant case gave rise to a suspicion that the defendant was under the influence of drugs or alcohol.

of the stop.”) Additionally, there is no evidence in the record before us relating to the effectiveness of the method employed by the government to further its interest. The record sheds no light on whether detaining traffic violators to question them about contraband is an effective way to uncover the transportation of such substances or whether it unjustifiably burdens those using the highways for legitimate purposes. It certainly cannot be said that there is some manifest relationship between individuals who violate the traffic laws regulating vehicle speed and those involved in the transportation of illegal substances. *Cf. Prouse*, 440 U.S. at 659 (“Absent some empirical data to the contrary, it must be assumed that finding an unlicensed driver among those who commit traffic violations is a much more likely event than finding an unlicensed driver by choosing randomly from the entire universe of drivers.”) Thus, the cases cited by appellant do not support the conclusion that the seizure in the instant case was reasonable even in the absence of an articulable suspicion of criminal activity.

Pennsylvania v. Mimms likewise does not support a finding that the detention in the instant case was reasonable. In *Mimms*, the Court found that it was reasonable for an officer making a routine traffic stop to direct a motorist to step out of the car while a citation was issued even though the officer had no suspicion that the driver was armed with a weapon. The Court found that the state’s interest in furthering the safety of the officer outweighed the intrusion on the driver’s liberty caused by the order to get out of the car. The Court found that the additional intrusion caused by making the driver get out of the car was “de minimis.” *Mimms*, 434 U.S. at 111. The Court noted that the driver was only being asked

to expose to view a little more of his person than was already exposed and that the only effect of the order was that the driver would spend the time during the stop along side of the car instead of in the driver's seat. This was termed at most "a mere inconvenience." We do not think that the detention of the defendant in the instant case is comparable to the order to get out of the car in *Mimms*. Appellant is correct that because the initial stop of the defendant was unquestionably lawful that we should only be concerned with the incremental intrusion caused by Officer Graham detaining the defendant to ask the series of questions relating to contraband. Cf. *Mimms*, 434 U.S. at 109. But notwithstanding the Supreme Court's recognition that an individual operating an automobile upon the highway may have a lesser expectation of privacy than does an individual in a residence, the person operating a car "does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to governmental regulation." *Prouse*, 440 U.S. at 662. We think that the detention of a motorist stopped for speeding to question him about what he has in his car that is not subject to public view³ and whether he is carrying large amounts of cash clearly impacts to some extent upon legitimate Fourth Amendment

³ The district court found that the questions asked of the defendant in this case were "intrusive" in nature. We find this characterization to be accurate. We do not address the Government's concern that the ruling in this case in effect bars an officer from engaging in ordinary conversation with motorists during traffic stops. Such is not the case. As the Government persuasively points out, it is impossible to draw "bright lines" in the area of Fourth Amendment rights. Each case must be dealt with upon the totality of the circumstances presented.

interests in privacy and security. This is clearly something more than a “mere inconvenience” and cannot be justified under the rationale of *Pennsylvania v. Mimms*. We therefore reaffirm our initial conclusion that the detention of the defendant constituted an unreasonable seizure under the Fourth Amendment.

Appellant next contends that the panel used the wrong standard of review in examining whether there was a reasonable suspicion of criminal activity to support the detention in this case. The panel stated that an appellate court must accept the district court’s determination that the circumstances did not give rise to an objective reasonable suspicion unless that determination was clearly erroneous. Slip Op. at 11. Citing generally to *United States v. Sokolow*, 490 U.S. 1, appellant contends that *de novo* review is appropriate in these circumstances. Although appellant contends that the Supreme Court “made clear” that *de novo* review is appropriate, we find no mention of the appropriate standard of review in *Sokolow*.

There appears to be a split among the circuits regarding the proper standard of review on this issue. See *United States v. Peoples*, 925 F.2d 1082, 1085 (8th Cir. 1991) (applying clearly erroneous standard of review); *United States v. Rose*, 889 F.2d 1490, 1496 (6th Cir. 1989) (same); *United States v. Mondello*, 927 F.2d 1463, 1470 (9th Cir. 1991) (whether the agent had a reasonable suspicion is a mixed question of fact and law subject to *de novo* review); *United States v. Uribe-Velasco*, 930 F.2d 1029, 1032 (2nd Cir. 1991) (*de novo* review is appropriate). See also *United States v. Bell*, 892 F.2d 959, 969 (Ebel, J., dissenting). The question of reasonable

articulable suspicion to support an investigatory detention, which this court reviews under the clearly erroneous standard, should not be confused with the ultimate determination of reasonableness under the Fourth Amendment, which we review *de novo*, see, e.g., *United States v. Pena*, 920 F.2d 1509, 1513-14 (10th Cir. 1990).

In the instant case, the panel found that the “clearly erroneous” standard was appropriate, relying on *United States v. Turner*, 928 F.2d 956 (10th Cir. 1991). Because a three-judge panel cannot overrule circuit precedent, we must deny the petition for rehearing. See *United States v. Spedalieri*, 910 F.2d 707, 710 n.3 (10th Cir. 1990). The panel opinion was clearly consistent with prior Tenth Circuit precedent.

It is therefore ordered that the petition for rehearing is denied.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 90-CR-13

UNITED STATES OF AMERICA, PLAINTIFF

vs.

RALPH JOSEPH WALKER, DEFENDANT

MEMORANDUM OPINION
AND ORDER

The Constitution of the United States is for everyman. It protects bad men as well as good. It guarantees the rights of individuals "to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. . . ." U.S. Const. amend. IV. The Fourth Amendment is binding on the states. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949). Its provisions inhibit overreaching by public officers, well motivated or not. Relying upon this guarantee and the rules of law which give it meaning, defendant in this case brought a motion to suppress evidence allegedly obtained in violation of the Fourth and Fourteenth Amendments. The motion was heard and evidence was taken in the matter on March 15-16, 1990. Defendant was represented by James Esparza. The government was represented by Heather Cooke, Assistant United States Attorney.

FACTS

Defendant Ralph Joseph Walker is a black man who, on January 10, 1990, was traveling west on Interstate 70 in Emery County, Utah. He was driving a blue 1988 Cadillac Fleetwood Brougham. Officer Richard Graham of the Emery County Sheriff's Department was traveling east on the interstate and noticed defendant's vehicle approaching. The traffic was light. Officer Graham observed that the vehicle was traveling at a faster than posted speed. He aimed his radar gun at defendant's vehicle and clocked defendant at 67 miles per hour—12 miles per hour over the posted speed limit. Officer Graham made a U-turn and pulled defendant over.

While coming to a stop behind defendant's vehicle, Officer Graham checked the license plate number on the Cadillac and was informed that the vehicle had not been reported stolen. Officer Graham approached the vehicle and stated that he had clocked defendant speeding. Transcript, Motion to Suppress, March 15-16, 1990 at 48 [hereinafter Transcript]. He asked defendant for his driver's license and vehicle registration and asked where defendant was coming from and his destination. Transcript at 9, 48. Defendant stated that he was coming from Kansas City and was on his way home. Transcript at 11. Defendant then requested permission to get out of the car in order to obtain his license from the back pocket of his slacks. Transcript at 48. As defendant stepped out of the car, he gave Officer Graham the vehicle registration. Defendant was nervous. His hands shook. It was difficult for him to retrieve his license from the small compartment in his wallet. He retrieved the license and gave it to Officer Graham. Transcript at 9.

The license revealed to Officer Graham that it belonged to defendant, identified him, and established his right to operate a motor vehicle. The Cadillac was registered in the name of Marian Smith. Officer Graham questioned defendant about the registration. Defendant stated that Marian Smith was his sister and that he was driving the car with her permission. Transcript at 11. It was later established that defendant had subleased the vehicle from Ms. Smith. A copy of the sublease agreement was in the vehicle glovebox at the time defendant was stopped.

While retaining defendant's license and registration, Officer Graham asked defendant a number of specific questions unrelated to the traffic stop. He asked if there were any weapons in the vehicle, if there were any open containers of alcohol in the vehicle, and if there was any controlled substance or paraphernalia of any kind in the vehicle. Officer Graham then asked if the defendant was carrying any large quantities of cash. Transcript at 12. Defendant answered "no" to each question except for stating that he had about \$1600.00 cash in the glove box and about \$150.00 cash in his pocket. Transcript at 49. When Officer Graham first approached the vehicle, he saw nothing to indicate that defendant was carrying any of the items about which he put questions. Transcript at 21.

While still holding defendant's license and registration, and without informing defendant that he was free to go, further discussing the speeding violation, or writing a citation, Officer Graham asked defendant if he could search the vehicle for the items about which he had inquired. Defendant responded, "sure, go ahead." Transcript at 12-13. Defendant was then asked to stand by the right front fender

of the vehicle. He complied. Officer Graham patted defendant down, checked under his sweater, the top of his slacks, and down his legs. He then searched the passenger compartment of the vehicle. In conformity with defendant's statement, Officer Graham found two rolls of cash in the glovebox which were held together with rubber bands. He found nothing else in the glovebox or in the passenger compartment. Officer Graham then asked for and received the key to the trunk. Transcript at 15. Upon opening the trunk, Officer Graham noticed two tan packages wrapped in clear plastic tape located near the back seat. The packages appeared to be kilogram packages of cocaine. Officer Graham informed defendant that he was under arrest and that he should get on his hands and knees and then lie face down on the ground. Transcript at 15-16.

The defendant and vehicle were taken to Castle Dale, Utah. A search warrant for the vehicle was obtained. Further search of the trunk uncovered 86 kilogram packages of cocaine. Three small plastic bags of cocaine were found in defendant's travel bag.

DISCUSSION

There is often misunderstanding as to the nature and purpose of a motion to suppress footed on an alleged constitutional violation. The simple purpose is vindication of fundamental law. When a defendant files a motion to suppress, in a sense, it is as if he had filed a class action for and on behalf of all citizens similarly detained. He speaks not just for himself. He speaks for everyman to the end that government achieve constitutional ends by constitutional means. That, simply put, is the glory of a written constitution and the touchstone of a

nation which provides evenhanded law and order for everyman, good or bad.

The narrow but exquisitely important question presented by this case is when may a person stopped for a traffic violation *and nothing more* be further detained and subjected to questions unrelated to the traffic stop.

It is well established that "the stopping of a vehicle and the detention of its occupants constitutes a 'seizure' within the meaning of the Fourth Amendment." *Colorado v. Bannister*, 449 U.S. 1, 4 n.3 (1980); see also *Delaware v. Prouse*, 440 U.S. 648, 653 (1979). In order to justify a defendant's *continued* detention, *an officer must have a reasonable suspicion that the stopped vehicle is carrying contraband or that a detained defendant has committed a crime. See United States v. Guzman*, 864 F.2d 1512, 1519 (10th Cir. 1988) (citing *Florida v. Royer*, 460 U.S. 491, 498-99 (1983)).

Defendant attacks the seizure and search of his vehicle on several grounds. He first contends that the initial stop of his vehicle was pretextual. Defendant's argument focuses on the fact that he is black and was driving a Cadillac on a common drug trafficking route. He contends that these were the reasons he was stopped, not because he was speeding. In the alternative, defendant contends that even if the stop was justified, the officer's detention for further questioning was not justified by the traffic stop. Finally, defendant argues that he did not voluntarily consent to having his vehicle searched. The government contends that the initial stop was not pretextual and that the questioning and search that followed were supported by the required reasonable suspicion. The government further contends that,

since the vehicle was leased by Marian Smith, defendant has no expectation of privacy and thus no standing to complain.

Upon review of the evidence, this court finds that, as a sublessee in possession, defendant had a "legitimate expectation of privacy" in the vehicle, and thus has standing to challenge the search. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). Defendant explained how he had come to possess the vehicle. It was not stolen. There is no evidence that he did not lawfully possess the car. See *United States v. Miller*, 821 F.2d 546, 548-49 (11th Cir. 1987); *United States v. Martinez*, 808 F.2d 1050, 1056 (5th Cir. 1987), *cert. denied*, 481 U.S. 1032 (1987).

The initial stop was not pretextual. "A pretextual stop occurs when the police use a legal justification to make the stop in order to search a person or place, or to interrogate a person, for an unrelated serious crime for which they do not have the reasonable suspicion necessary to support a stop." *Guzman*, 864 F.2d at 1515; see also *United States v. Fabela-Garcia*, No. 88-CR-71 (D. Utah 1988) (granting motion to suppress). In determining whether an officer had legal justification to stop a vehicle, an objective standard is used. *Guzman*, 864 F.2d at 1517. The court should ask itself whether, under the same circumstances and with the absence of any invalid purpose, a reasonable officer would have made the stop. *Id.*

A reasonable officer would have stopped defendant under these circumstances. Defendant was traveling twelve miles per hour over the posted speed limit. Police officers routinely stop cars that are traveling at such speeds and issue warnings or citations. This stop was objectively justified, and there is no evidence to suggest that the stop was pretextual.

Having determined that the initial stop was constitutional, the court must next consider the detention and search that followed and determine "whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968); see also *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion) ("The scope of the detention must be carefully tailored to its underlying justification.").

The Tenth Circuit's *Guzman* opinion is instructive, indeed controlling, regarding a continued detention and search when a person is stopped for a traffic violation. The facts in this case and the facts of *Guzman* are very similar. *Guzman* points out that "[a]n officer conducting a routine traffic stop may request a driver's license and vehicle registration, run a computer check, and issue a citation." *Guzman* 864 F.2d at 1519 (citing *United States v. Gonzales*, 763 F.2d 1127, 1130 (10th Cir. 1985); *United States v. Recalde*, 761 F.2d 1448, 1455 (10th Cir. 1985)). The *Guzman* court stated:

When the driver has produced a valid license and proof that he is entitled to operate the car, he must be allowed to proceed on his way, without being subjected to further delay by police for additional questioning. In order to justify 'a temporary detention for questioning,' the officer must also have reasonable suspicion 'of illegal transactions in drugs or of any other serious crime'.

Id. (emphasis added) (citations omitted).¹

¹ In *Guzman*, the officer asked defendant "whether his wife was employed, where he was headed, where he worked, when

The narrow issue here is whether, *prior* to asking questions unrelated to the traffic stop, the officer had a "reasonable suspicion of illegal transactions in drugs or of any other serious crime" which justified further detention of defendant. *Id.* Upon reaching the driver's door, the officer asked for and received defendant's driver's license and the car registration. The license was valid and belonged to defendant. The vehicle registration identified Marian Smith as the registered owner. The officer questioned defendant, who responded that Ms. Smith was his sister and that he was driving the car with her permission. The automobile was not stolen. Defendant appeared nervous. His hands shook when he removed the license from his wallet. At that point the officer asked defendant if he had any weapons, alcohol, or any type of controlled substances or paraphernalia of any kind in the vehicle. The officer further asked if defendant had any large quantities of cash in the vehicle.² Defendant answered "no" to each of these

he got married, and if they were carrying any large sums of money." *Guzman* at 1514. The officer further inquired as to whether "they were carrying weapons or contraband." *Id.* The Tenth Circuit recognized the fact that the district court deemed these intrusive questions that the ordinary citizen would find offensive. *Id.* at 1519.

² The United States Supreme Court has "yet to rule directly on whether mere questioning of an individual by a police official, without more, can amount to a seizure under the Fourth Amendment" *INS v. Delgado*, 466 U.S. 210, 216 (1984). The Court stated that:

[P]olice questioning, by itself, is unlikely to result in a Fourth Amendment violation. While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the

questions, except for stating that he had \$1600.00 in the glovebox and \$150.00 in his pocket. Finally, the officer asked if he could search the vehicle for the items about which he had asked.

At the suppression hearing, the government relied on defendant's nervousness and the registration in a name other than his own as the basis for continued detention and questioning. Defendant relied on *Guzman* to establish that continued detention was not "objectively reasonable." In *Guzman*, when an officer approached one of the defendants, she would not look the officer in the eye, was apprehensive, and was notably perspiring. *Guzman* 864 F.2d at 1520. The court also noted that she was noticeably pregnant and was sitting in a car with the engine off in the middle of the desert several thousand miles from her home. *Id.* Under those circumstances, the court found that her actions did not arouse objective suspicion.³ *Id.* As in *Guzman*, defendant's nervousness

response. Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment.

Id. In this case, the officer did more than just question defendant. The officer had pulled defendant over to the side of the road and had possession of his driver's license and vehicle registration. Because the officer had his papers, defendant was not free to leave. Defendant testified that he felt he was going to be arrested at any moment. Transcript at 55. As in *Guzman*, the stop was a seizure which evoked Fourth Amendment protection requiring reasonable suspicion to justify defendant's continued detention and questioning.

³ In *United States v. Grillo*, 705 F. Supp. 576 (M.D. Ga. 1989), the court found that nervousness, combined with

in this case did not create objective suspicion justifying the officer's continued detention and intrusive questions.

Guzman stated that "when the driver produces . . . proof that he is entitled to operate the car, he must be allowed to proceed on his way" *Id.* at 1519 (emphasis added). Defendant furnished the registration and stated that he had permission to operate the car. The officer asked for nothing more. Defendant later testified that the glovebox contained a signed copy of a sublease agreement between Ms. Smith and defendant. Had the officer asked for proof of entitlement to operate the Cadillac, defendant claims that he would have produced it. This, coupled with the facts that the officer had no evidence to establish that the car was stolen or that defendant was not entitled to operate it, leaves the record bereft of evidence, at that point, to establish reasonable suspicion that defendant had committed a crime or was carrying contraband. The question of sequence is of monumental importance.

The government's final argument is that defendant was detained for only ten minutes before he was arrested. The United States Supreme Court made clear in *United States v. Sharpe*, 470 U.S. 675, 685-87 (1985), that the basis for and circumstances surrounding the stop, rather than an arbitrary time limit, determine the stop's permissible length. Here, the stop was for a short period of time. Nevertheless, the detention was unreasonable because it extended

the facts that the officer *knew* that the defendant had a loaded gun and that while stopped defendant had reached under his seat and either retrieved or placed something, established reasonable suspicion which justified additional questioning.

beyond the scope justified by the original traffic stop. The officer continued the detention without additional facts to establish reasonable suspicion of a more serious crime. The detention and subsequent search thus violated the Fourth Amendment. *See Guzman*, 864 F.2d at 1519 n.8.

Defendant's final argument is that he did not voluntarily consent to the search. Having found that defendant's Fourth Amendment rights were violated at the time the officer detained him and put additional questions, the court need not address the issue of consent.

CONCLUSION

State officers must comply with fundamental rules. They must act constitutionally. When they do not, evidence gathered in derogation of fundamental rules cannot be used. This is done not to insulate a defendant from prosecution but to vindicate—take seriously—the applicable constitutional provision. No one has yet come up with a better way to ensure compliance with the Constitution by state officers as they attempt to carry out their duties.

At times the lines drawn by Court[s] of Appeals are very narrow lines. Nevertheless, the lines as drawn by the Court of Appeals are binding on officers who gather evidence, prosecutors who screen and prosecute offenses, and trial courts who hear cases. In applying the lines that were drawn in *Guzman*, this court notes that “[t]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all.” *Arizona v. Hicks*, 480 U.S. 321, 329 (1987). Officer Graham had legal justification to stop defendant for a traffic violation. After inspecting defendant's driver's license and vehicle registra-

tion, the officer did not have facts sufficient for an objective, reasonable suspicion to justify continued detention and more extensive questioning. From that point on evidence obtained was tainted and must be suppressed. *Guzman*, 864 F.2d 1512.

IT IS SO ORDERED.

DATED this 27 day of March, 1990.

/s/ Bruce S. Jenkins
BRUCE S. JENKINS
Chief Judge
United States District Court



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No. 91-943

In The
Supreme Court of the United States
October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

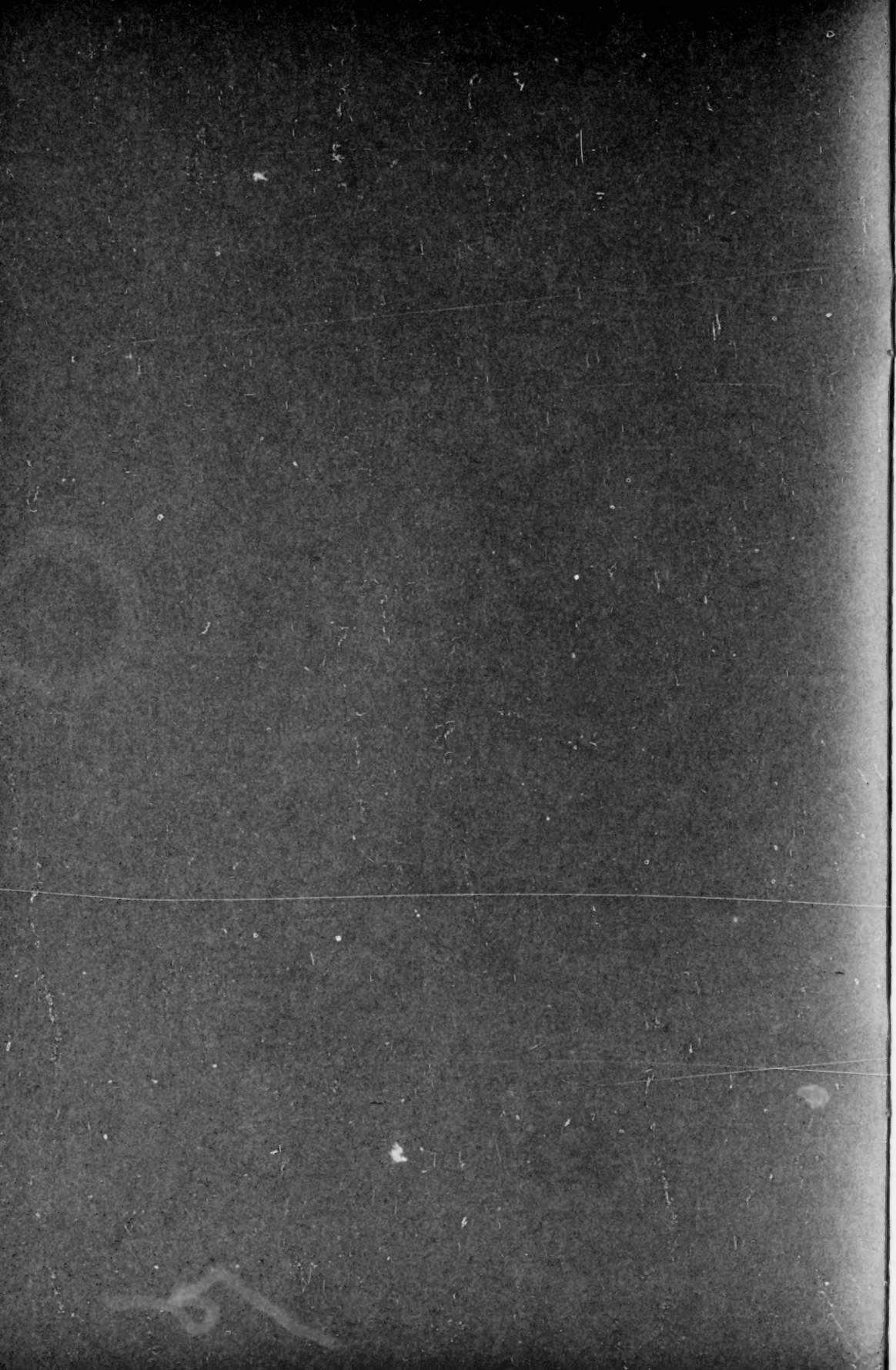
RALPH JOSEPH WALKER,

Respondent.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether seizure of the respondent, considering the totality of the circumstances, was reasonable.

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No. 91-943

In The
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UNITED STATES OF AMERICA,

Petitioner,

v.

RALPH JOSEPH WALKER,

Respondent.

**Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

BRIEF IN OPPOSITION

Respondent by and through his attorney of record hereby submits his brief in opposition to the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 933 F.2d 812. The opinion of the court of appeals on the denial of the request for rehearing is reported at 941 F.2d 1086. The opinion of the district court is reported at 751 F.Supp. 199.

JURISDICTION

This Court does not have jurisdiction to hear this matter because the writ of certiorari was timely filed. On May 7, 1991, the court of appeals issued its opinion in this matter. On May 29, 1991, the government filed a request for an extension of time to file the request for rehearing en banc. Pursuant to Rule 35 and Rule 40, Fed.R.App.P., a suggestion for a rehearing en banc was filed by petitioner on June 19, 1991. On November 4, 1991, petitioner requested an extension of time to file the writ of certiorari, and Justice White granted the request. Petitioner filed the writ of certiorari on December 11, 1991.

Rule 13.1 of the Rules of the Supreme Court provides:

A petition for writ of certiorari to review a judgment in any case, civil or criminal entered by a . . . United States court of appeals . . . shall be deemed in time when it is filed with the clerk of this Court within 90 days after the entry of the judgment sought to be reviewed.

Rule 13.4 of the Rules of the Supreme Court provides:

The time for filing a petition for writ of certiorari runs from the date of the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari for all parties (Whether or not they requested the rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. *A suggestion made to a United*

States court of appeals for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule. (emphasis added).

Petitioner seeks to review the decision of the court of appeals dated on May 7, 1991. Pursuant to Rule 13.1 and 13.4, Rules of the Supreme Court, the petition for writ of certiorari should have been filed on or before July 26, 1991. Rule 13.4 provides no expansion of the time period for petitioner because it explicitly does not provide for a tolling the 90 day time period by a request/suggestion for rehearing in banc pursuant to Rule 35(b). Accordingly, this court has no jurisdiction to hear this matter.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

1. On January 10, 1990, respondent, Ralph Joseph Walker, was traveling west on Interstate 70 through Emery County, State of Utah. He was driving a blue 1988 Cadillac Fleetwood Brougham. Officer Richard Graham

of the Emery County Sheriff's Department was traveling east bound on the interstate when he noticed respondent's vehicle approaching. Officer Graham noticed that the traffic was light and that Mr. Walker's vehicle was traveling at a rate of speed faster than the posted speed limit. Officer Graham made a U-turn and pulled the respondent over. App. of petitioner, 26a.

Before coming to a stop behind Mr. Walker's vehicle, Officer Graham conducted a warrants/wants check on the Cadillac and was informed that the Cadillac was not stolen. Officer Graham approached the vehicle and requested Mr. Walker's driver's license and registration. Mr. Walker produced both. App. of petitioner, 26a.

While retaining respondent's driver license and registration, Officer Graham then began to ask respondent a series of questions unrelated to the traffic stop. He asked the respondent if there were any weapons in the vehicle, open containers of alcohol, any controlled substances or paraphernalia of any kind. Officer Graham then questioned respondent whether he was carrying any large quantities of cash. When Officer Graham first approached the vehicle he saw nothing to indicate that the respondent was carrying any of the items about which he questioned respondent about. Officer Graham asked these questions because he was curious.

With Mr. Walker's driver license and registration in his possession, and without further discussing the traffic citation, Officer Graham asked defendant permission to search in the interior of the car. Officer Graham

instructed respondent to proceed to the front of the vehicle where Officer Graham patted down Mr. Walker. Officer Graham searched the interior of the vehicle and then the trunk. Upon opening the trunk Officer Graham observed two packages wrapped in clear plastic tape. The packages appeared to be cocaine. Officer Graham then placed Mr. Walker under arrest. App. of petitioner, 28a.

2. Respondent was indicted for violation of 21 U.S.C. 841(a)(1). He filed a motion to suppress evidence on the grounds that the traffic stop was pretextual, that the scope of the detention was not reasonably related to the purposes of the traffic stop, and that he did not voluntarily consent to the search of his vehicle. The government responded that the stop was not pretextual and that there existed reasonable suspicion to justify the secondary detention. The trial court found that the stop was not pretextual, but held that based on *Terry v. Ohio*, 392 U.S. 1 (1968) and *Florida v. Royer*, 460 U.S. 491 (1983), that the detention was not reasonably related to the circumstances which justified the interference in the first place. The trial court was of the opinion that based on the totality of the circumstances that the questioning was intrusive. App. of petitioner 31a.

3. The government appealed. On appeal the government argued that the encounter between the respondent and Officer Graham was consensual, and that reasonable suspicion existed for the detention. On May 7, 1991, the court of appeals rejected the government's argument that the encounter was consensual and ruled that the district court did not err in finding that the respondent's continued detention was not based on reasonable suspicion.

The court of appeals remanded the case back to the district court for a determination on the issue of consent.

4. On June 19, 1991, petitioner filed a request and suggestion for en banc consideration. The petition was denied. In the request for rehearing the government asserted that bright line rule was being used. The court of appeals denied the request for rehearing, but issued a clarifying opinion responding to the assertion that a bright line rule was being implemented.

ARGUMENT

THERE EXISTS NO SPECIAL OR IMPORTANT REASONS FOR THE COURT TO GRANT THE WRIT OF CERTIORARI

Petitioner's brief on its face fails to articulate any reason for this Court to invoke its discretionary jurisdiction and hear this matter. The court of appeals did not adopt a bright line test to determine the reasonableness of the seizure involved in this case, and the court of appeals should not be faulted for the failure of the petitioner to establish in the record any reasons whatsoever for the behavior of Officer Graham. The court of appeals based on the totality of circumstances determined that seizure of the respondent was unreasonable. The legal principles applied to the facts of this case are well established and there exist no exceptional or important reason for this Court to grant the petition for writ of certiorari.

1. Petitioner suggests that the traffic stop involved in this case is analogous to the road block involved in

Michigan State Police v. Sitz, 110 S.Ct. 2481 (1990). However, the court of appeals found that the type of stop which took place in this case more resembled that of a random stop which the court denounced in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). App. of petitioner 19a. It is beyond dispute that the Fourth Amendment is implicated in this case because stopping an automobile and detaining its occupants constitutes a seizure within the meaning of the Amendment, even though the resulting detention is quite brief. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979), see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 556-558 (1976). All seizures must be reasonably related to the circumstances which justified the interference in the first place. *Terry v. Ohio*, 392 U.S. 1 (1968). And the Fourth Amendment requires that any seizure must be reasonable. *United States v. Brignoni-Ponce*, 422 U.S. 873, 876 (1975). Reasonableness depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers. *United States v. Brignoni-Ponce*, Id. at 880.

In apply the balancing test there must exist some evidence of the public interest the government is attempting to vindicate. In this case the record is bereft of any evidence concerning the public interest petitioner is attempting to vindicate. Petitioner argues that Officer Graham was concerned about narcotics interdiction yet there is no support for this assertion in the record. ("*Graham gave no testimony indicating that he suspected the defendant was involved in any criminal activity.*") (emphasis added) App. of petitioner 7a. Without evidence identifying and supporting the public interest sought to be vindicated the trial court and the court of appeals was left with

one conclusion to reach. A court of appeals must decide a case based on the record or lack of record before it. After the fact justifications for the police conduct involved in this case does not serve as a basis for review by this Court.

2. Petitioner characterizes the questioning of respondent as brief and as being reasonably related to the purposes of the traffic stop. However, Graham testified that the question or questions were posed to the defendant because he was curious, and he never testified that he asked the questions because he was concerned about the speeding violation. Tr. pg. 24. Officer Graham did testify that he deviated from the procedure in Emery County which is to obtain the driver's license and registration from the citizen and then issue the driver a citation accompanied by a bail schedule directing the citizen where to appear and the amount of fine. Tr. pg. 27.

3. Petitioner further suggests that a minimal degree of intrusion was directed to respondent. The use of these words is a thin disguise for what took place. The officer pulled the respondent over to the side of the road and had possession of his driver's license and registration. Respondent was not free to leave. Respondent testified that he felt that he was going to be arrested at any moment. App. of petitioner pg. 33a. It is not reasonable or credible to suggest that questioning someone stopped for a minor traffic violation about the quantity of money he possesses is not intrusive. Any stop by a law enforcement officer signaling a moving automobile to pull over to the side of the roadway is likely to create substantial anxiety. *Delaware v. Prouse*, 440 U.S. 648, 657 (1979). And questions about how much money a driver has in his possession

undoubtedly would create unwarranted anxiety in even the most law abiding citizen. Furthermore, a police officer conducting a routine traffic stop has no right or justifiable reason to question a citizen about the quantity of money he has in his possession. Furthermore, if Officer Graham was concerned about drunk driving then the proper procedure is to engage in field sobriety test. However, Graham never testified that he was concerned about the possibility of driving under the influence.

Admittedly petitioner is correct that Fourth Amendment cases create difficult line drawing problems for law enforcement officers and the courts. However, what petitioner condemns the court of appeals for is exactly what it is requesting from this Court. While desirable a bright line rule is not workable for Fourth Amendment cases, such as this case, which must be decided from the totality of the circumstances taking into consideration the credibility of the witnesses and the weight to be given to the evidence, together with the inferences, deductions and conclusions to be drawn from the evidence. *United States v. Pappas*, 735 F.2d 1232, 1233.

There is nothing new, exceptional or important concerning this case. The legal principles applied to this case are well established. And clearly the record in this case does not support the assertions of the petitioner. Review by this Court is not warranted.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 91-943

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In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH JOSEPH WALKER

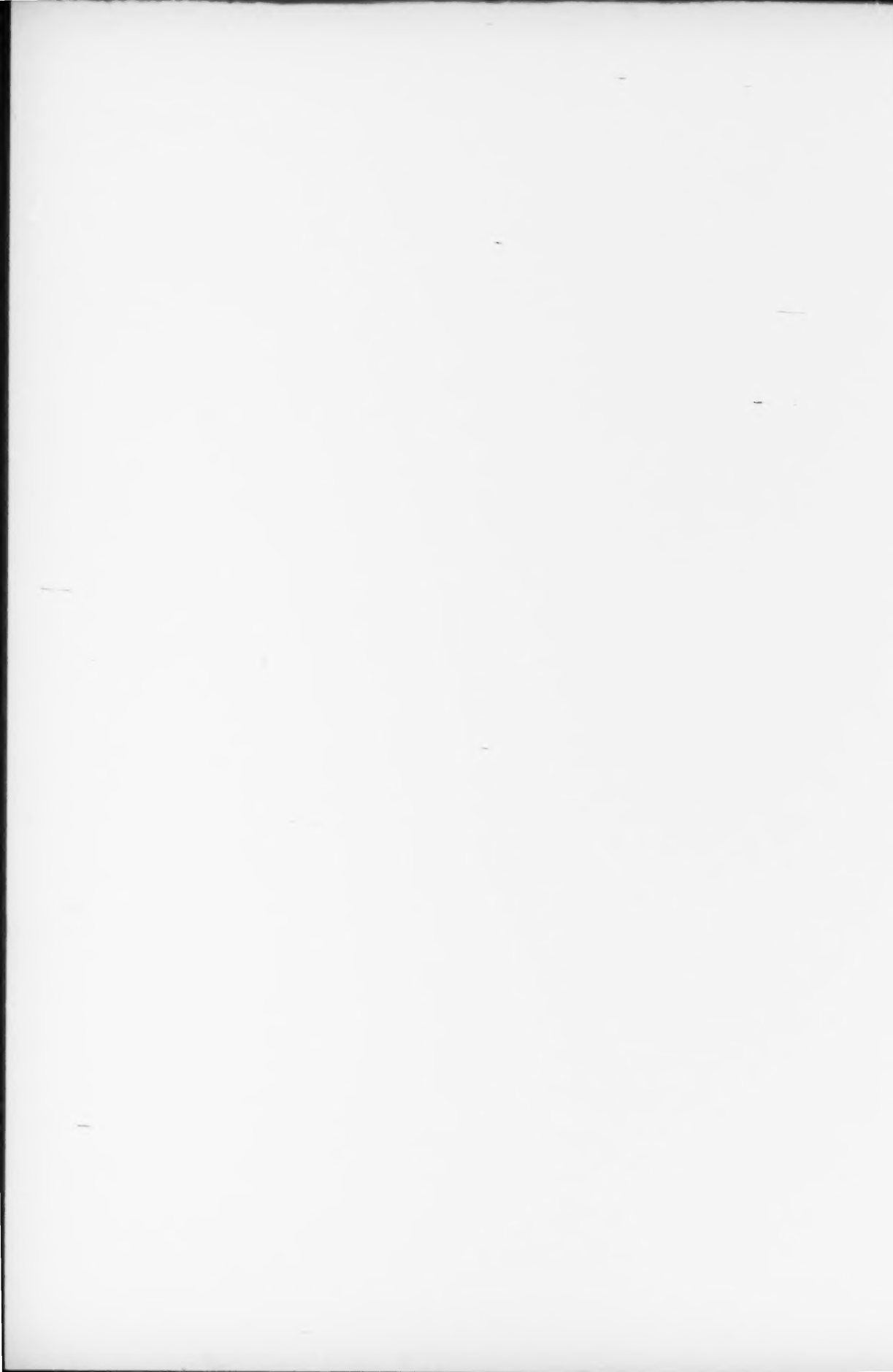
ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

1. Respondent contends that this Court lacks jurisdiction because the government's suggestion of rehearing en banc did not toll the time in which to file a petition for a writ of certiorari. Br. in Opp. 2-3. That contention is without merit.

A suggestion of rehearing en banc, standing alone, does not toll the time for filing a petition for a writ of certiorari.¹ That rule, however, has no applica-

¹ Sup. Ct. R. 13.4 provides:

[I]f a petition for rehearing is timely filed in the lower court by any party in the case, the time for filing the petition for a writ of certiorari * * * runs from the date of the denial of the petition for rehearing or the entry of a subsequent judgment. A suggestion made to a United States court of appeals for rehearing en banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule.

tion in this case because the government filed not only a suggestion of rehearing en banc, but also a petition for rehearing. Respondent's contention, Br. in Opp 2-3, that the government filed only a suggestion of rehearing en banc is unsupported by the record. On May 17, 1991, the government filed a timely motion for a 30-day "extension of time in which to file a Petition for Rehearing and Suggestion for En Banc Consideration." 5/17/91 Gov't Mot. 1. The court granted the motion, extending the government's time for filing until June 20, 1991. 5/31/91 Order 1. On June 19, 1991, the United States filed a pleading styled, "Petition for Rehearing and Suggestion for En Banc Consideration." Gov't C.A. Pet. 1. That pleading invoked not only Fed. R. App. P. 35, which pertains to rehearing en banc, but also Fed. R. App. P. 40, which pertains to petitions for rehearing. Gov't C.A. Pet. 1.²

In any case, this Court held in *Missouri v. Jenkins*, 495 U.S. 33, 45-47 (1990), that when a court of appeals interprets and actually treats a pleading, however styled, as a petition for rehearing, the disposition of that pleading starts the period within which to file a petition for a writ of certiorari. Here, the court of appeals understood the government's pleading to re-

² The government's pleading at one point asserts that the United States "hereby petitions for a rehearing of the instant appeal by this Honorable Court en banc." Gov't C.A. Pet. 1. It is evident, however, from the caption of the pleading and the citation of Fed. R. App. P. 35 and 40 that the government was filing both a petition for rehearing *and* a suggestion of rehearing en banc. Indeed, the very next sentence in the pleading states that "[t]his Petition for Rehearing and Suggestion for En Banc Consideration has been personally authorized by the Solicitor General * * *." Gov't C.A. Pet. 1.

quest not only rehearing en banc, but panel rehearing as well. In its August 13, 1991, order denying the suggestion of rehearing en banc, the full court noted that "by separate order the panel denied the petition for rehearing." Pet. App. 13a. The same day, the panel issued an order both denying the petition for rehearing and setting forth a supplemental opinion that responded to arguments raised in the petition for rehearing. Pet. App. 15a-24a.³ The time for filing the petition in this case therefore commenced on August 13—"the date of the denial of the petition for rehearing," Sup. Ct. R. 13.4. The petition for a writ of certiorari was timely filed. See Pet. 1-2.

2. In support of his contention that this case does not warrant the Court's review, Br. in Opp. 6-9, respondent merely rehearses the reasoning set forth in the opinions of the court of appeals. Respondent first argues that the court "did not adopt a bright line test," but decided the case upon the totality of the circumstances that surrounded the seizure. *Id.* at 6. That assertion is contradicted by the text of the opinion below. The court of appeals made clear that it adhered to the rigid rule, announced in *United States v. Guzman*, 864 F.2d 1512, 1519 (10th Cir. 1988), that "[w]hen the driver has produced a valid license and proof that he is entitled to operate the car, he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning." Pet. App. 6a.

³ As this Court has observed, "[a] petition for rehearing is designed to bring to the panel's attention points of law or fact that it may have overlooked." *Missouri v. Jenkins*, 495 U.S. at 46 n.14. The panel in this case issued a supplemental opinion because it had "failed to address [the government's] argument that the detention was lawful even in the absence of any reasonable suspicion." Pet. App. 17a.

Respondent next contends that the record evidence fails to establish the public interest underlying the questions asked by Officer Graham; the asserted interest in narcotics interdiction, in respondent's view, is a post hoc justification for unlawful police conduct. Br. in Opp. 7-8. Respondent supports his claim by citing Officer Graham's testimony that he did not suspect that respondent was engaged in any criminal activity when he asked the questions about illegal contraband. *Id.* at 7. That argument, however, merely assumes respondent's conclusion that Officer Graham needed reasonable suspicion before he could ask three or four brief questions regarding the presence of contraband in a validly stopped vehicle. The absence of reasonable suspicion, however, cannot be equated with an absence of any governmental interest in conducting investigative inquiries. See, e.g., *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481 (1990). Respondent does not, and could not, see Pet. 10-11 & n.4, contest the acknowledged strong public interest in interdicting alcohol, illegal drugs and paraphernalia for their use, and weapons on the Nation's highways—an interest that the decision below makes considerably more difficult for law enforcement officers to vindicate.⁴

⁴ Respondent contends that Officer Graham's questions were not reasonably related to the purpose of the stop because Officer Graham was not concerned about the speeding violation, but was merely "curious" when he asked the questions about contraband. Br. in Opp. 8. Officer Graham's subjective motivation, however, has no bearing on the reasonableness of his brief inquiries under the Fourth Amendment. See, e.g., *Scott v. United States*, 436 U.S. 128, 138 (1978) ("We have * * * held that the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invali-

Respondent finally contends that the degree of intrusion at issue is more than minimal because (1) being pulled to the side of the road creates substantial anxiety; (2) respondent feared that he was going to be arrested at any moment; and (3) Officer Graham's question regarding large quantities of cash was intrusive. Br. in Opp. 8-9. Those arguments are without merit. First, the court of appeals held, Pet. App. 7a, and respondent does not contest, that the initial stop was valid; the intrusion of being pulled to the side of the road is therefore not at issue in this case. Second, respondent's personal fear of being arrested is irrelevant; this Court has indicated that the degree of intrusion is measured, for Fourth Amendment purposes, in terms of the fear and surprise that would be felt by "lawful travelers," *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976), and not by a motorist carrying large quantities of contraband. Cf. *Sitz*, 110 S. Ct. at 2486 ("The 'fear and surprise' to be considered are not the natural fear of one who has been drinking over the prospect of being stopped at a sobriety checkpoint, but, rather, the fear and surprise engendered in law abiding motorists by the

date the action taken as long as the circumstances, viewed objectively, justify that action."). Respondent also claims that Officer Graham testified that his questions were a deviation from Emery County police practice, Br. in Opp. 8, but the record does not support that claim. In the portion of the transcript that respondent cites, Officer Graham responded affirmatively to defense counsel's question whether the procedure for a traffic stop "basically * * * is to give the Defendant a citation and ask him to sign it" and to provide the defendant with "a Request to Appear by Mail." Tr. 27. This exchange describes the basic outlines of the typical citation procedure; it does not establish that it was a deviation from Emery County's established practice for an officer to ask a few brief questions about contraband during the course of a traffic stop.

nature of the stop.”); *Florida v. Bostick*, 111 S. Ct. 2382, 2388 (1991) (for Fourth Amendment purposes, “the ‘reasonable person’ test presupposes an *innocent* person”). Third, although we believe that, in context, Officer Graham’s questions were minimally intrusive, see Pet. 13 n.6, respondent errs in measuring the intrusion by reference to the questions as such. The court of appeals indicated that the same questions would have been permissible had Officer Graham asked them before receiving the results of the National Crime Information Center (NCIC) computer check on respondent’s vehicle, Pet. App. 9a n.2; the intrusion at issue, therefore, is the brief delay involved in asking the otherwise permissible questions after the NCIC check was completed. See Pet. 13. This Court’s decisions establish that so minimal an intrusion, incidental to an otherwise valid traffic stop, is permissible even in the absence of reasonable suspicion. See *Martinez-Fuerte*, 428 U.S. at 547, 560, 563 (upholding three to five minutes of questioning at secondary checkpoint); see also *New York v. Class*, 475 U.S. 106, 115 (1986) (police may intrude into passenger compartment to see vehicle identification number); *Pennsylvania v. Mimms*, 434 U.S. 106, 109-111 (1977) (police may ask motorist to exit vehicle).

3. What is more significant than the arguments respondent makes are the arguments he does not make. As we have explained, Pet. 9, 13-14, we believe that the court of appeals’ decision conflicts with this Court’s decisions in *Martinez-Fuerte*, *Class*, and *Mimms* by condemning a *de minimis* intrusion that serves substantial governmental interests in interdicting alcohol, illegal drugs and paraphernalia for their use, and weapons on the Nation’s highways. Respond-

ent does not even cite *Class* or *Mimms*, much less explain why the decision of the court of appeals does not conflict with them. And while respondent cites *Martinez-Fuerte* in passing, for the uncontroversial principle that a traffic stop constitutes a Fourth Amendment seizure, Br. in Opp. 7, he makes no effort to explain how the decision below can be squared with that case.

For the foregoing reasons and those given in the petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

KENNETH W. STARR
Solicitor General

JANUARY 1992